IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO.5511 OF 2006
IN
FIRST APPEAL NO.1235 OF 2004

Shri Narayandas Maganlal Ahuja & Anr. ...Applicants

Versus

Shri Dhondu Babu Vadekar & Anr. ...Respondents

Shri R.M.Hardas i/by Harshad Deshpande for the Applicants.

Shri S.I.Jaykar for the Respondent No.1.

CORAM : A. S. OKA, J.

DATE : JANUARY 10, 2007.

P.C.:

1. Heard Shri Hardas appearing for the Applicants and Shri Jaykar for the first Respondent. The Applicant is the Appellant in the First Appeal. By the said First Appeal he has challenged an order of restitution passed under section 144 of the Code of Civil Procedure, 1908 by the Trial Court.

2. The Applicants Plaintiffs filed S.C.No.4023 of 1978 for possession of the suit premises against the first Respondent herein. There was an ex-parte decree passed in the said suit for possession. The ex-parte decree was executed by the Applicants through court and

he obtained possession of the suit premises. On a Notice of Motion taken out by the first Respondent, the Trial Court restored the suit by setting aside the ex-parte decree. The suit was tried and by Judgment and Decree dated 27th October, 2004, the suit was dismissed. The Trial Court passed an order of restitution. The first Respondent made a separate Application under section 144 of the said Code. By the order dated 04th November, 2004, the said Application was allowed. The Applicants have preferred two Appeals. First Appeal No.249 of 2005 has been preferred for challenging the decree of dismissal of the suit and the First Appeal No.1235 of 2004 is filed for challenging the order of restitution as the order of restitution is a decree within meaning of section 2(2) of the said Code.

3. The learned Advocate for the Applicants stated that initially this court stayed the order of restitution and both the Appeals were directed to be disposed of finally at admission stage. He stated that thereafter the Appeals were dismissed for default and were restored by this court.

4. There is some controversy raised as to whether while restoring the Appeals, this court orally directed that order of restitution should not be executed. Without going into the said controversy, I have heard the learned counsel appearing for the Applicant on merits of the prayer for grant of stay. His submission is that as the Appeals are to be decided at admission stage, the order of restitution cannot be allowed to be executed. He submitted that the Applicants have inducted the second Respondent as the tenant in the suit premises. He submitted that the Code of Civil Procedure, 1908 provides for a right of Appeal and the said statutory right of Appeal will be defeated if order of stay is not passed. He submitted that if order of stay is not granted, Appeal will become infructuous.

5. I have considered the submissions. The Applicants have obtained possession of the suit premises by executing an ex-parte decree which has been set aside. Moreover after a full trial, the suit filed by the Applicants has been dismissed on merits. In such a case order of restitution must follow as a course. Moreover, in the present case the Applicants

are not in possession and they have already parted with possession in favour of the second Respondent. In so far as order of restitution is concerned, only in exceptional cases that the operation of such order can be stayed. Even if interim relief is not granted in an Appeal under section 96 of the said Code, it cannot be said that the Appeal becomes infructuous. In the event the Appellants succeed in the Appeal, consequential orders can always be passed by the Appellate Court.

6. In the present case the Applicants have already parted with possession and the second Respondent who is admittedly in possession has not taken any steps to challenge the order of restitution. In my view, there is no merits in the prayer for grant of stay and the same deserves to be rejected and the same is hereby rejected.

7. At this stage, the learned counsel for the Applicants has tendered on record an undertaking of the second Respondent in which he has undertaken to handover vacant and peaceful possession of the suit premises to the first Respondent (original Defendant) within a period of four weeks. He states that the

second Respondent is personally present in the court. In view of the said undertaking, the learned counsel prays that order of restitution may not be allowed to be enforced for a period of four weeks. He submits that after the first Respondent is placed in possession, he should not be allowed to part with possession and create third party interests. The learned counsel for the first Respondent on instructions of the first Respondent states that after the first Respondent is placed in possession of the suit premises, he will not part with the possession of the suit premises in favour of any third party and will not create any third party interests in respect of the suit premises till the disposal of the Appeal. The statement made by the learned first Respondent is accepted.

8. Hence, I pass the following order:

(i) Civil Application No.5511 of 2006 is rejected.

(ii) Undertaking of the second Respondent Shri Satish Hegde which is marked "X" for identification is accepted.

(iii) In view of the said undertaking, the order of restitution shall not be enforced for a period of four weeks from today.

(iv) In view of the undertaking, the possession of the suit premises will be handed over to the first Respondent on or before 07th February, 2007. In the event the possession is not handed over on or before 07th February, 2007, the first Respondent, apart from his other remedies, is free to execute the order of restitution and obtain possession.

(v) Place the First Appeal No.1235 of 2004 and First Appeal No.249 of 2005 for directions on 20th February, 2007.

JUDGE